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## Criminal Procedure - Statements Made during a Prearrest Delay That Exceeds Six Hours Ruled Inadmissible in Pennsylvania

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## Recent Developments

### CRIMINAL PROCEDURE — STATEMENTS MADE DURING A PREARRAIGNMENT DELAY THAT EXCEEDS SIX HOURS RULED INADMISSIBLE IN PENNSYLVANIA.

*Commonwealth v. Davenport* (Pa. 1977)

Samuel R. Davenport was arrested on suspicion of murder and held by the police for approximately nineteen and one-half hours before arraignment in court.<sup>1</sup> During this time, Davenport was interrogated, placed in a lineup, had his clothing taken for laboratory testing and, after eight hours of detention, he confessed to the commission of the crime.<sup>2</sup> Appealing from a second degree murder conviction in the Philadelphia Court of Common Pleas, Davenport asserted that his statement should have been suppressed as "the product of unnecessary delay between arrest and arraignment in violation of [rule 130 of the Pennsylvania Rules of Criminal Procedure]."<sup>3</sup> The Pennsylvania Supreme Court<sup>4</sup> reversed the conviction and granted a new trial, *holding* that 1) with respect to Davenport, the unnecessary eight hour delay between his arrest and confession required suppression of his statement;<sup>5</sup> and 2) with respect to future cases, unless the defendant is

1. *Commonwealth v. Davenport*, 471 Pa. 278, 282, 370 A.2d 301, 304 (1977). The 19½ hour detention period was established by defendant's unrefuted testimony. *Id.* at 282, 370 A.2d at 304.

Arraignment as utilized in this case and in this note refers to the procedures required for preliminary arraignment according to rule 140 of the Pennsylvania Rules of Criminal Procedure. 471 Pa. at 283, 370 A.2d at 304. This preliminary arraignment constitutes the defendant's first post-arrest appearance before a neutral judicial official. Other jurisdictions have given different names to this procedure. *See, e.g.*, Md. R. CRIM. P. 5(a) ("appearance before the magistrate"); TENN. CODE ANN. § 40-401 (1975) ("preliminary proceedings").

2. 471 Pa. at 281-82, 370 A.2d at 303-04. Eight hours after his arrest, defendant made his first admission of guilt, followed by both a handwritten and a formal typewritten statement. *Id.* at 282, 370 A.2d at 303-04.

3. *Id.* at 281, 370 A.2d at 303, *citing* PA. R. CRIM. P. 130 and *Commonwealth v. Futch*, 447 Pa. 389, 290 A.2d 417 (1972). Rule 130 provides: "When a defendant has been arrested without a warrant in a court case, he shall be taken without *unnecessary delay* before the proper issuing authority where a complaint shall be filed against him and he shall be given an immediate preliminary arraignment." PA. R. CRIM. P. (emphasis added). Rule 122 of the Pennsylvania Rules of Criminal Procedure prohibits unnecessary prearrestment delay following arrests made with a warrant. PA. R. CRIM. P. 122. Since a violation of rule 130 was asserted by Davenport, it is assumed that the defendant was arrested without a warrant. *See* 471 Pa. at 280-81, 370 A.2d at 303. The time of preliminary arraignment is important because, according to one source, police may have no control over the suspect after preliminary arraignment. Interview with Gilbert Branche, Chief County Detective, Philadelphia, Pennsylvania (Jan. 13, 1978).

4. Jurisdiction in this case was based upon the Appellate Court Jurisdiction Act of 1970, 42 PA. CONS. STAT. ANN. § 722(1) (Purdon Supp. 1977).

5. 471 Pa. at 281, 286, 370 A.2d at 303, 306. The period which the court measured here was not that period between arrest and arraignment but rather the period

arraigned within six hours of arrest, statements made after arrest but prior to arraignment shall be inadmissible at trial. *Commonwealth v. Davenport*, 471 Pa. 278, 370 A.2d 301 (1977).

The origin of the *Davenport* court's approach to prearraignment delay is traceable to two United States Supreme Court cases that were appeals from federal prosecutions, *McNabb v. United States*<sup>6</sup> and *Mallory v. United States*.<sup>7</sup> In *McNabb*, the Court ruled that statements by the defendants made during a detention of indeterminate length should be suppressed<sup>8</sup> not for constitutional reasons, but rather pursuant to the Court's power to supervise the federal administration of criminal justice.<sup>9</sup> One of the policy reasons behind this holding was to check reprehensible police behavior which might be attributable to long detention.<sup>10</sup> In *Mallory*, the Supreme Court reversed and remanded a conviction based upon a confession made during an unreasonable overnight delay prior to arraignment.<sup>11</sup>

between arrest and confession. *Id.* at 285, 370 A.2d at 305. The court stated: "We conclude that the eight hour delay between appellant's arrest and his first admission was unnecessary." *Id.* (footnote omitted). Perhaps the court used this period because there was no evidence other than defendant's testimony which could establish when the arraignment occurred. *Id.* at 282, 370 A.2d at 304. For other cases measuring unnecessary delay between arrest and the eliciting of a statement, see note 37 *infra*.

6. 318 U.S. 332 (1943).

7. 354 U.S. 449 (1957).

8. See 318 U.S. at 334-35. Since there is no proof of the time of arraignment in the record, it is never precisely stated in *McNabb* how long defendants were detained before arraignment. However, in a subsequent congressional hearing on the admissibility of evidence in federal cases it was acknowledged that the defendants "were in fact arraigned in timely fashion." *Admission of Evidence in Certain Cases: Hearings on H.R. 3690 Before Subcomm. No. 2 of the House Comm. on the Judiciary*, 78th Cong., 1st Sess. 27, 29 (1943) (testimony of Attorney General Biddle) (Sup. Doc. No. Y 4J89/1: Ev/3). Cases applying *McNabb* have developed the requirement that statements elicited must have some reasonable relationship to the delay in order for such statements to be suppressed. See *United States v. Mitchell*, 322 U.S. 65 (1944).

9. 318 U.S. at 340-42. The supervisory powers of the federal courts, first extensively utilized by Justice Frankfurter in *McNabb*, have no clearly discernible source at either common law, in Article III of the United States Constitution or in the Enabling Act of 1934, 28 U.S.C. § 2072 (1970). See Note, *The Judge-Made Supervisory Power of the Federal Courts*, 53 GEO. L. J. 1050, 1051-56 (1965). Justice Frankfurter in *McNabb* described the policy reasons behind the Court's supervisory powers:

Judicial supervision of the administration of criminal justice in the federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence. Such standards are not satisfied merely by observance of those minimal historic safeguards for securing trial by reason which are summarized as "due process of law" and below which we reach what is really trial by force.

318 U.S. at 340.

10. 318 U.S. at 343-44. For the policy reasons behind the six-hour *Davenport* rule, see notes 22-28 and accompanying text *infra*; text accompanying notes 41-43 *infra*.

11. 354 U.S. at 449, 453, 455-56. Justice Frankfurter's opinion for the majority relied upon the holding in *McNabb* and upon rule 5(a) of the Federal Rules of Criminal Procedure. *Id.* at 451-53 citing *McNabb v. United States*, 318 U.S. 332 (1943) and FED. RULES CRIM. P. 5(a). Rule 5(a) provides in pertinent part:

An officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person

There is widespread acceptance of the need for prompt arraignment.<sup>12</sup> The "federal approach" as developed in *McNabb — Mallory* was first

without unnecessary delay before the nearest available federal magistrate. . . .

If a person arrested without a warrant is brought before a magistrate or other officer, a complaint shall be filed forthwith. . . .

FED. R. CRIM. P. 5(a). Justice Frankfurter's opinion stressed that, in light of the legislative standard of arraignment "without unnecessary delay" an extended delay was impermissible. 354 U.S. at 455, *quoting* Fed. R. Crim. P. 5(a).

12. Many jurisdictions require prompt arraignment. The following rules and statutes provide that an accused must be brought before a judicial officer "without unnecessary delay," "without undue delay," "with reasonable promptness," or synonymous language: CAL. PENAL CODE § 849(a) (West 1972); COLO. R. CRIM. P. 5(a)(1); CONN. GEN. STAT. ANN. § 6-49 (West Supp. 1977); IDAHO CODE § 19-615 (1948); ILL. ANN. STAT. ch. 38, § 109-1(a) (Smith-Hurd 1970); IOWA CODE ANN. § 758.1 (West Supp. 1977-78); KAN. CRIM. CODE & CODE OF CRIM. PROC. § 22-2901(1)-(2) (Vernon 1970); ME. R. CRIM. P. 5(a); MISS. CODE ANN. § 99-3-17 (1972); MONT. REV. CODES ANN. § 95-901(a)-(b) (1969); NEV. REV. STAT. § 171.178(i) (1971); N.Y. CRIM. PROC. LAW 140.20(1) (McKinney 1971); N.C. GEN. STAT. § 15A-501 (Supp. 1975); 1 N.D. CENT. CODE § 29-06-25 (1960); OHIO REV. CODE ANN. § 2935.05 (Page 1975); OKLA. STAT. ANN. tit. 22, § 181 (West 1969); PA. R. CRIM. P. 130; TEX. CRIM. PROC. CODE ANN. art. 15.17 (Vernon 1977); UTAH CODE ANN. § 77-13-17 (Supp. 1977); VT. R. CRIM. P. 3(b); W. VA. CODE § 62-1-5 (1977); WIS. STAT. ANN. § 970.01 (West 1971); WYO. R. CRIM. P. 5(a).

The following statutes provide that an accused must be brought before a judicial officer "forthwith," "immediately," ARK. STAT. ANN. § 43-601 (1964); IND. CODE § 35-4-1-1 (1976). On the federal level, *see* § 3501(c) of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 3501(c) (1976). For a discussion of this act, *see* note 15 *supra*.

Several state rules and statutes provide that an accused be brought before a judicial officer within a fixed time period. *See* ALASKA STAT. § 12.25.150(a) (Supp. 1977) (24 hours); ARIZ. R. CRIM. P. 4.1(a) (24 hours); DEL. CODE ANN. tit. 11, § 1909 (Michie 1974) (24 hours); FLA. R. CRIM. P. 3130 (24 hours); GA. CODE ANN. § 27-212 (1972) (48 hours); HAW. REV. STAT. § 803-9(5) (Supp. 1975) (48 hours); KY. R. CRIM. PROC. 3.02(2) (12 hours absent exigent circumstances in warrantless arrest cases); LA. CODE CRIM. PROC. ANN. art. 229 (West 1967) (provides for notification of district attorney within 48 hours); *Id.* art. 230.1(A) (Supp. 1977) (provides for bringing before magistrate for appointment of counsel within 144 hours); MINN. R. CRIM. P. 4.02 (36 hours which may be extended in the case of felonies); MO. ANN. STAT. § 544.170 (Vernon 1953) (20 hours); NEB. REV. STAT. § 29-410 (1964) (one night or longer); N.H. REV. STAT. ANN. § 594:20-a (1974) (24 hours). *See also* D.C. CODE § 4-140(a) (1973) (prearrestment questioning may last only three hours).

Both the National Advisory Commission on Criminal Justice (Commission) and the American Law Institute (ALI) have issued recommendations with respect to unnecessary prearrestment delay. *See* NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, *Corrections* Standard § 4.5 (1973) (Sup. Doc. No. Y3.C86:2C81) [hereinafter cited as NATIONAL ADVISORY STANDARDS]; MODEL CODE OF PREARRAIGNMENT PROCEDURE § 130.2 (1975) [hereinafter cited as MODEL CODE]. The Commission's standard provides in pertinent part as follows: "A person in the physical custody of law enforcement agency on the basis of an arrest, with or without a warrant, should be taken before a judicial officer without unnecessary delay. In no case should the delay exceed 6 hours." NATIONAL ADVISORY STANDARDS, *Corrections* § 4.5. The ALI's MODEL CODE provides in pertinent part:

(1) *Disposition: Release, Production before Judicial Officer.* Unless an order is entered under Subsection (2) of this Section, not later than [two] hours after an arrested person is brought to the police station the station officer shall make one of the following dispositions: [release, release on recognizance, release with bail, release subject to citation, retain custody].

. . . .

adopted in Pennsylvania in *Commonwealth v. Futch*.<sup>13</sup> The defendant in *Futch* had been placed in a lineup without assistance of counsel "some thirteen hours after his arrest."<sup>14</sup> The Pennsylvania Supreme Court, citing *McNabb-Mallory* and the Pennsylvania Rules of Criminal Procedure, said that "identifications based on a lineup held in violation of the unnecessary delay [standards became] inadmissible at trial."<sup>15</sup> *Futch* was clarified

(2) *Order for Screening in Certain Cases.* The station officer may, in lieu of making one of the dispositions authorized by Subsection (1) of this Section, order that the arrested person be detained for a period of screening . . .

(3) *Duration of the Period of Screening.* The period of screening authorized by Subsection (2) of this Section shall not exceed the time actually necessary . . . and in any event shall not exceed [three] hours.

MODEL CODE § 130.2 See also ABA STANDARDS, *Pretrial Release* § 4.1 (1968), which provides in part that "every arrested person should be taken before a judicial officer without unnecessary delay." *Id.*

13. 447 Pa. 389, 394, 290 A.2d 417, 419 (1972).

14. *Id.* at 392, 290 A.2d at 419.

15. *Id.* at 392-95, 290 A.2d at 418-20, citing Pa. R. Crim. P. 118, PA. STAT. ANN. (Purdon Pamphlet 1972) (current version at PA. R. CRIM. P. 130). For the thrust of these rules, see note 3 *supra*. In adopting this "federal approach," the court stated that all evidence obtained during the delay shall be excluded except that which "has no reasonable relationship to the delay whatsoever." 447 Pa. at 394, 290 A.2d at 419. In so concluding, the court noted that the *McNabb-Mallory* rule "is subject to the common sense caveat that the 'unnecessary delay' must have contributed to the securing of the evidence." 447 Pa. at 393, 290 A.2d at 419. The court in *Futch* also compared rule 118 to rule 5(a) of the Federal Rules of Criminal Procedure. 447 Pa. at 394, 290 A.2d at 419. See note 11 *supra*. Since the Supreme Court has supervisory power over federal courts, the *McNabb* rule of exclusion has not been imposed upon state courts. *Stein v. New York*, 346 U.S. 156, 187 (1953); *Gallegos v. Nebraska*, 342 U.S. 55, 64 (1951).

The issue of "unnecessary delay" in *Futch* had been formerly raised in *Commonwealth v. Koch*, 446 Pa. 469, 288 A.2d 791 (1972). There the court found that the defendant was "repeatedly and carefully warned of his constitutional rights and properly treated by the police." *Id.* at 474, 285 A.2d at 793. There was no evidence in *Koch* of delay for the purpose of inducing a confession. *Id.* at 474, 288 A.2d at 793-94. The court went on to state that "[t]he presence of 'unnecessary delay' in securing a preliminary arraignment is a factor to be considered in assessing the voluntariness of a confession." *Id.* at 474-75, 288 A.2d at 794 (citations omitted). For a discussion of the *McNabb-Mallory* rule, *Futch*, and *Koch*, see generally *Pennsylvania Supreme Court Review: Developments in Pennsylvania Criminal Procedure*, 47 TEMP. L. Q. 38, 49-55 (1973).

After *Futch*, a decided split among the justices evolved in similar prearrest cases. In all the following cases the justices were divided 4-3 over the issue of exclusion of statements due to prearrest delay. *Commonwealth v. Lasch*, 464 Pa. 259, 346 A.2d 547 (1975); *Commonwealth v. Abu-Ibn Hanifah Bey*, 462 Pa. 533, 341 A.2d 902 (1975); *Commonwealth v. Cullison*, 461 Pa. 301, 336 A.2d 296 (1975); *Commonwealth v. Barilak*, 460 Pa. 449, 333 A.2d 859 (1975); *Commonwealth v. Johnson*, 459 Pa. 171, 327 A.2d 618 (1974); *Commonwealth v. Wilson*, 458 Pa. 285, 327 A.2d 621 (1974); *Commonwealth v. Sanders*, 458 Pa. 281, 327 A.2d 43 (1974); *Commonwealth v. Cherry*, 457 Pa. 201, 321 A.2d 611 (1974); *Commonwealth v. Dixon*, 454 Pa. 444, 311 A.2d 613 (1973); *Commonwealth v. Dutton*, 453 Pa. 542, 307 A.2d 238 (1973).

*Commonwealth v. Tingle*, 451 Pa. 241, 301 A.2d 701 (1973), aptly illustrates the grounds for this split in the court. In that case, Justice Eagen, in a concurring opinion in which Justices Jones and Pomeroy joined, viewed rule 118 (current version at PA. R. CRIM. P. 130) as "a mere procedural device, lacking in constitutional dimension." *Id.* at 249, 301 A.2d at 705. The majority, however, relying on *Futch* and

further in *Commonwealth v. Williams*,<sup>16</sup> which formulated a three-part test to determine whether there has been an "unnecessary delay"<sup>17</sup> prohibited by the rules of criminal procedure. This test requires that the following questions be answered: 1) Was the delay unnecessary? 2) Was any prejudicial evidence obtained during the delay? 3) Was any such prejudicial evidence reasonably related to the delay?<sup>18</sup> At least one subsequent case has stated that "the only delay which can be tolerated is that necessary for administrative processing,"<sup>19</sup> which was described in *Williams* as "fingerprinting, photographing, and the like."<sup>20</sup>

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rules 118 and 119 (current versions at PA. R. CRIM. P. 130, 140), had found that the unnecessary delay in *Tingle* required exclusion of prejudicial statements made during such detention. 451 Pa. at 247, 301 A.2d at 704. These sentiments were transformed into a debate concerning the retroactive application of the *Futch* rule. See, e.g., *Commonwealth v. Dutton*, 453 Pa. 542, 307 A.2d 238 (1973). This debate over the retroactivity of *Futch* was the basis for most of the splits in the aforementioned cases.

The *McNabb-Mallory* and *Futch* rules have both a procedural and an evidentiary dimension, since violation of the procedural rule results in the exclusion of certain evidence. See Hogan & Snee, *The McNabb-Mallory Rule: Its Rise, Rationale and Rescue*, 47 GEO. L.J. 1, 2 (1958).

Curiously enough the court in *Futch* recognized the *McNabb-Mallory* rule despite the fact that Congress had modified it by legislation in 1968. See § 3501(c) of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 3501(c) (1976), which provides that a confession is not admissible solely because of delay if the trial judge finds the confession was voluntary, if the weight to be given to the confession is left to the jury, and if the confession was made within six hours of arrest or detention, provided such delay was not a result of transportation problems. *Id.* The delay between arrest and arraignment is only one factor to be considered in determining voluntariness. *Id.* § 3501(b). For judicial interpretations of this statute, see *United States v. Davis*, 459 F.2d 167, 170 (6th Cir. 1972) (court noted that Congress modified the *Mallory* rule by statute); *United States v. Davis*, 456 F.2d 1192, 1195 (10th Cir. 1972) (factors in *McNabb* and *Mallory* are among those to be used in determining voluntariness); *United States v. Hathorn*, 451 F.2d 1337, 1341 (5th Cir. 1971) (any delay beyond six hours is merely another factor in determining voluntariness and not conclusive); *United States v. Halbert*, 436 F.2d 1226, 1232-37 (9th Cir. 1970) (interprets § 3501(c) to make voluntary admissions within six hours of arrest clearly admissible and those made beyond six hours admissible if voluntary). But see *United States v. Mendoza*, 473 F.2d 697, 702 (5th Cir. 1973) (a violation of unnecessary delay provision of rule 5(a) of the Federal Rules of Criminal Procedure renders evidence inadmissible). This legislation is generally believed to be constitutional. See Note, *Title II of the Omnibus Crime Control Act: A Study in Constitutional Conflict*, 57 GEO. L.J. 438, 449-54 (1968); Comment, *Title II of the Omnibus Crime Bill: A Study of the Interaction of Law and Politics*, 48 NEB. L. REV. 193, 207-08 (1968). For a discussion of congressional power to formulate a test of admissibility different from the Supreme Court's, see generally S. REP. NO. 1097, 90th Cong., 2d Sess. 53-63, reprinted in [1968] U.S. CODE CONG. & AD. NEWS 2112, 2139-50.

16. 455 Pa. 569, 319 A.2d 419 (1974). The *Williams* court found that defendant's statement taken during a 27 hour delay was prejudicial since it "constituted the most telling element of the Commonwealth's case against Williams." *Id.* at 572-73, 319 A.2d at 420. The delay was found unnecessary since it was not justified by administrative processing but was utilized for corroborating defendant's statement. *Id.* at 573, 319 A.2d at 421. The court also found the statement elicited after seven hours reasonably related to the total delay. *Id.*

17. *Id.* at 573-74, 319 A.2d at 421.

18. *Id.* at 572, 319 A.2d at 420.

19. *Commonwealth v. Odom*, 467 Pa. 395, 399, 357 A.2d 150, 152 (1976), citing *Commonwealth v. Tingle*, 451 Pa. 241, 245, 301 A.2d 701, 703 (1973).

20. 455 Pa. at 573, 319 A.2d at 421.

Before setting forth a new six-hour rule, the *Davenport* court addressed the issue of whether Davenport's statements given during prearrest detention should have been admitted into evidence at his trial.<sup>21</sup> The court explored the procedural<sup>22</sup> and judicial<sup>23</sup> policies behind the requirement of "preliminary arraignment without unnecessary delay"<sup>24</sup> and determined that it serves two important functions. Prompt arraignment both ensures that the accused is informed of his constitutional rights<sup>25</sup> by a "neutral judicial officer"<sup>26</sup> and "minimizes the possibility of unnecessary abridgement of a citizen's liberty"<sup>27</sup> by checking against abuse by the arresting authority.<sup>28</sup> The court explained that if the accused was not afforded arraignment promptly, *Futch* rendered evidence obtained during the period of unnecessary delay inadmissible at trial.<sup>29</sup> Applying the three-part *Williams* test<sup>30</sup> to the facts *sub judice*, the court determined that the delay was unnecessary<sup>31</sup> and that the evidence obtained during the delay was both prejudicial<sup>32</sup> and reasonably related to the delay.<sup>33</sup> The *Davenport*

21. 471 Pa. at 282-86, 370 A.2d at 304-06.

22. The *Davenport* court noted that rules 122 and 130 of the Pennsylvania Rules of Criminal Procedure mandate that an accused be brought before a judicial officer for preliminary arraignment without unnecessary delay. 471 Pa. at 282, 370 A.2d at 304, citing PA. R. CRIM. P. 122, 130. See note 3 *supra*. The court acknowledged that these rules served the purpose of promptly providing the protections enumerated in rule 140 of the Pennsylvania Rules of Criminal Procedure. 471 Pa. at 282-83, 370 A.2d at 304 (citation omitted). Rule 140 provides that the court shall inform the accused of the charges against him, his right to counsel, his right to a preliminary hearing, and his right to bail. PA. R. CRIM. P. 140.

23. 471 Pa. at 283, 370 A.2d at 304, citing *Gerstein v. Pugh*, 420 U.S. 103 (1975) (an accused has the right to be free from unreasonable seizure of his person); *Miranda v. Arizona*, 384 U.S. 436 (1966) (defendant's right to counsel); *Commonwealth v. Dixon*, 454 Pa. 444, 311 A.2d 613 (1973) (prompt arraignment requirement ensures accused is promptly afforded rights embodied in rule 140 and checks against abuse by arresting officer); *Commonwealth v. Tingle*, 451 Pa. 241, 301 A.2d 701 (1973) (prompt arraignment requirement ensures accused is promptly afforded rights embodied in rule 140 and checks against abuse by arresting officer). For a discussion of rule 140, see note 22 *supra*.

24. 471 Pa. at 282, 370 A.2d at 304.

25. *Id.* at 283, 370 A.2d at 304.

26. *Id.*

27. *Id.* at 284, 370 A.2d at 304 quoting *Commonwealth v. Dixon*, 454 Pa. 444, 446, 311 A.2d 613, 614 (1973).

28. 471 Pa. at 283, 370 A.2d at 304.

29. 471 Pa. at 284, 370 A.2d at 305. For a discussion of the *Futch* case, see notes 13-15 and accompanying text *supra*. The court further stated that this rule had been adopted not simply to guard against coercion, but to ensure that the defendant's rights are afforded without unnecessary delay. *Id.* For a discussion of the utility of the exclusionary rule, see note 55 *infra*.

30. For a discussion of the *Williams* test, see notes 16-18 and accompanying text *supra*.

31. 471 Pa. at 284-85, 370 A.2d at 305. The delay was found unnecessary, since it was "attributed to investigation and interrogation." *Id.* at 285, 370 A.2d at 305.

32. *Id.*

33. *Id.* at 285-86, 370 A.2d at 305-06. The court found that the evidence and the delay were reasonable related, since defendant did not confess until after eight hours of detention. *Id.* at 286, 370 A.2d at 306. It is interesting to note that despite the discussion of the *McNabb-Mallory* rule in *Futch*, the *Davenport* court made no mention of the "federal approach" of those Supreme Court cases. See notes 6-11 and accompanying text *supra*.

court thus concluded that the defendant's "statement should have been suppressed as a product of unnecessary prearrestment delay."<sup>34</sup>

In addition to ruling on Davenport's detention, the court, pursuant to its supervisory powers,<sup>35</sup> announced a six-hour limitation between arrest and arraignment.<sup>36</sup> In introducing the new rule, the court noted that its experience since *Futch*<sup>37</sup> led to the conclusion that it "should adopt a rule under which the admissibility of any statement taken while the accused is in custody before preliminary arraignment is based on the length of delay between arrest and arraignment."<sup>38</sup> The new rule requires that

[i]f the accused is not arraigned within six hours of arrest, any statement obtained after arrest but before arraignment shall not be admissible at trial. If the accused is arraigned within six hours of arrest, pre-arraignment delay shall not be grounds for suppression of such

34. 471 Pa. at 286, 370 A.2d at 306. Since the admission of this statement had been objected to at trial, the court ruled that the defendant was entitled to a new trial. *Id.*

35. *Id.* With respect to the supervisory powers of the Pennsylvania state courts over the administration of justice, article V, § 10 of the Pennsylvania Constitution provides in part:

(a) The Supreme Court shall exercise general supervisory and administrative authority over all the courts and justices of the peace.

....

(c) The Supreme Court shall have the power to prescribe general rules governing practice, procedure and the conduct of all courts, justices of the peace and all officers serving process or enforcing orders, judgments or decrees of any court or justice of the peace . . . and the administration of all courts and supervision of all officers of the judicial branch, if such rules are consistent with this Constitution and neither abridge, enlarge nor modify the substantive rights of any litigant, nor affect the right of the General Assembly to determine the jurisdiction of any court or justice of the peace, nor suspend nor alter any statute of limitation or repose. All laws shall be suspended to the extent that they are inconsistent with rules prescribed under these provisions.

PA. CONST. art. V, § 10.

36. 471 Pa. at 286, 370 A.2d at 306.

37. *Id.* The court might have been suggesting that case law prior to *Davenport* was consistent with and required the promulgation of a six-hour rule. The court also might have been alluding to the heavy case load of prearrestment delay cases.

The six-hour rule, however, does differ to some extent from the *Futch* rule (see text accompanying notes 13-15 *supra*) in requiring that the delay be measured between arrest and arraignment. *Id.* at —, 370 A.2d at 306. Some prior cases measured the delay between arrest and the eliciting of a statement. See, e.g., *Commonwealth v. Palmer*, 463 Pa. 26, 31, 342 A.2d 387, 390 (1975); *Commonwealth v. Lasch*, 464 Pa. 259, 262, 346 A.2d 547, 548-49 (1975); *Commonwealth v. Cullison*, 461 Pa. 301, 303, 336 A.2d 296, 297 (1975); *Commonwealth v. Barilak*, 460 Pa. 449, 452, 333 A.2d 859, 861 (1975); *Commonwealth v. Parker*, 458 Pa. 381, 389, 327 A.2d 128, 132 (1974); *Commonwealth v. Dixon*, 454 Pa. 444, 446, 311 A.2d 613, 615 (1973). Furthermore, the *Davenport* rule requires the suppression of all statements if the six hours is exceeded. 471 Pa. at 286, 370 A.2d at 306, whereas the *Futch* rule required suppression of all prejudicial evidence reasonably related to an unnecessary delay. 447 Pa. at 394, 290 A.2d at 419. See note 49 and accompanying text *infra*.

38. 471 Pa. at 286, 370 A.2d at 306.



statements except as the delay may be relevant to constitutional standards of admissibility.<sup>39</sup>

The court's stated purpose in promulgating the six-hour limitation was to clarify the admissibility standards for statements taken during unnecessary delays.<sup>40</sup> The court specifically mentioned the benefits of certainty, "even-handed application," judicial economy, and reduction of pretrial delay.<sup>41</sup> The inflexible six-hour standard<sup>42</sup> would, according to the court, also serve to discourage violation of the prompt arraignment requirement and thereby ensure speedy implementation of the protections provided by preliminary arraignment.<sup>43</sup> In a footnote the court recognized that "it is difficult to fix any particular time limit. Nevertheless, we conclude that six hours provides a workable rule which can readily be complied with in the absence of exigent circumstances."<sup>44</sup> The court further stated that any statements taken within the six-hour time period would still be subject to

39. *Id.* at 286-87, 370 A.2d at 306 (citations omitted) (footnote omitted). It is submitted that the court was attempting to promulgate a *per se* rule with respect to prearrestment detention. Black's Law Dictionary defines *per se* as "[b]y himself or itself; taken alone; inherently; in isolation; unconnected with other matters." BLACK'S LAW DICTIONARY 1294 (4th ed. rev. 1968) (citations omitted).

The court also stated that the six-hour standard was consistent with the court's prior determination of what constituted "unnecessary delay." 471 Pa. at 286 n.7, 370 A.2d at 306 n.7. Although six hours or more may usually have been recognized as constituting "unnecessary delay," in some pre-*Davenport* cases statements were held admissible because such evidence was not reasonably related to the delay or because the delay was found to be necessary. See *Commonwealth v. Coley*, 466 Pa. 53, 61-62, 64-65, 351 A.2d 617, 621, 623 (1976); *Commonwealth v. Boone*, 467 Pa. 168, 176-77, 354 A.2d 898, 902 (1975); *Commonwealth v. Tervalon*, 463 Pa. 581, 591 n.7, 345 A.2d 671, 676 n.7 (1975); *Commonwealth v. Rogers*, 463 Pa. 393, 397, 344 A.2d 889, 891 (1975); *Commonwealth v. Palmer*, 463 Pa. 26, 30-31, 342 A.2d 387, 389-90 (1975); *Commonwealth v. Milton*, 461 Pa. 535, 541, 337 A.2d 282, 285 (1975); *Commonwealth v. Bryant*, 461 Pa. 3, 12-13, 334 A.2d 603, 608 (1975); *Commonwealth v. Hamilton*, 460 Pa. 686, 693-94, 334 A.2d 588, 591 (1975). A detention exceeding six hours has also been found necessary to permit "initial police questioning and administrative processing due to the unusual circumstances and the number of people involved." *Commonwealth v. Simmons*, 239 Pa. Super. Ct. 220, 224, 362 A.2d 402, 404 (1976).

40. 471 Pa. at 287, 370 A.2d at 306.

41. *Id.* The court asserted that judicial economy should result, since the task of determining admissibility of statements will be simplified. *Id.* This simplification, according to the court, "should also lessen the burden on prosecution and defense resources." *Id.* The court also reasoned that pretrial delay would be reduced since there would be little need for pretrial litigation on admissibility of statements. *Id.*

42. See note 39 *supra*.

43. 471 Pa. at 287-88, 370 A.2d at 306. See notes 22-28 and accompanying text *supra*. For a discussion of the efficacy of the exclusionary rule in carrying out these purposes, see note 55 and accompanying text *infra*.

44. 471 Pa. at 286 n.7, 370 A.2d at 306 n.7. The recognition by the court of the possibility of exigent circumstances hindering compliance may, it is submitted, provide a practical exception to the apparently rigid new rule. The intended meaning of this somewhat cryptic footnote should become clearer when the supreme court has the opportunity to confront "exigent circumstances" assertions in subsequent cases.

"constitutional standards of admissibility."<sup>45</sup> Finally the court declared that the six-hour limitation would be applicable only prospectively.<sup>46</sup>

Although the *Davenport* court promulgated the rule after careful delineation of the policies behind prompt arraignment as reflected in applicable Pennsylvania case law and procedural rules,<sup>47</sup> several unanswered questions and practical problems arise with respect to the six-hour standard.<sup>48</sup> The fact that the court did not define such terms as "statement" and "arrest" which are used within the rule may well produce inconsistency in interpretation and application. The term "any statement" used in the rule<sup>49</sup> could be interpreted to include either oral or written statements, or

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45. 471 Pa. at 287, 370 A.2d at 306, citing *Commonwealth v. Eiland*, 450 Pa. 566, 301 A.2d 651 (1973) and *Commonwealth ex rel. Butler v. Rundle*, 429 Pa. 141, 239 A.2d 426 (1968). In the latter two cases confessions were considered involuntary and therefore inadmissible. 450 Pa. at 574, 301 A.2d at 654-55; 429 Pa. at 156, 239 A.2d at 431. Both cases also considered a lengthy detention between arrest and arraignment to be one factor used in assessing involuntariness. 450 Pa. at 572-74, 301 A.2d at 653-54; 429 Pa. at 154-56, 239 A.2d at 432-33. Involuntariness is not actually an exception to the per se six-hour rule, since any rule promulgated by the court would be subject to constitutional standards. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 172-80 (1803). Furthermore, it would seem that the fifth and fourteenth amendments would require the exclusion of any coerced statements, whether or not a delay was part of the coercion. See generally *Malloy v. Hogan*, 378 U.S. 1, 6 (1964) (compulsory self-incrimination, as protected by the fifth amendment, is also protected against state infringement by the fourteenth amendment); *Brown v. Mississippi*, 297 U.S. 278, 286 (1936) (confessions obtained by torture are inconsistent with the due process clause of the fourteenth amendment); *Bram v. United States*, 168 U.S. 532, 542 (1897) (fifth amendment controls issue of whether a confession is incompetent because involuntary).

46. 471 Pa. at 288, 370 A.2d at 307. The court attached an order to the opinion which postponed the effective date of the rule until May 16, 1977. *Id.*

47. *Id.* Pa. at 282-88, 370 A.2d at 304-07. See notes 22-33 and accompanying text *supra*.

48. See note 63 and accompanying text *infra*.

49. 471 Pa. at 286, 370 A.2d at 306. The *Davenport* rule differs from the *Futch* rule in requiring that "any statement" be excluded rather than "all evidence." *Id.* See *Commonwealth v. Futch*, 447 Pa. 389, 394, 290 A.2d 417, 419 (1972) (lineup identification of an accused who lacked counsel suppressed). The Federal Rules of Evidence define a statement as: "(1) [A]n oral or written assertion or (2) nonverbal conduct of a person, if it is intended by him as an assertion." FED. R. EVID. 801(a). It is questionable whether the court's emphasis in *Davenport* on excluding statements is justified, since studies show that interrogation is necessary in only a small percentage of arrests. See Witt, *Non-Coercive Interrogation and the Administration of Criminal Justice: The Impact of Miranda on Police Effectuality*, 64 J. CRIM. L.C.&P.S. 320, 324-25 (1973); Comment, *Interrogations in New Haven: The Impact of Miranda*, 6 YALE L.J. 1519, 1640-41 (1967).

Since the six-hour rule supersedes the *Williams* test, a strict application of the six-hour rule would presumably require exclusion of statements not prejudicial to an accused. See *Commonwealth v. Simmons*, 239 Pa. Super. Ct. 220, 362 A.2d 402 (1976) (statement taken during six-hour delay between arrest and arraignment admissible since statement was not connected to the delay, was not a confession but exculpatory and, therefore, not prejudicial). This would imply that words not constituting admissions, declarations or confessions would be subject to exclusion if the six-hour limit were exceeded. See, e.g., *Commonwealth v. Jones*, 97 Pa. Super. Ct. 417, 421 (1929) (statements revealing defendant's act, conduct, and declarations before the crime were admissible to show motive and intent); *Commonwealth v. Lewis*, 190 Pa. Super. Ct. 591, 596, 155 A.2d 410, 413 (1959) (statements amounting to attempts at concealment or diverting suspicion were admissible since they were not considered confessions). The difference between an admission and a confession has been

both,<sup>50</sup> as well as gestures or other nonverbal communications.<sup>51</sup> The rule could thus also be read to require the exclusion of exculpatory statements made by the accused during prearrest, unless courts determine that the rule is inapplicable with respect to exculpatory statements.<sup>52</sup>

It is suggested that, although the rule's six-hour period begins with the arrest, because "arrest" is not defined, it may be difficult to discern in a particular case when arrest occurs and the counting of the six-hour period is triggered.<sup>53</sup> The brevity of the period of time covered by the rule makes it imperative, it is submitted, that a clear definition of arrest be provided to those whose responsibility it is to ensure compliance. At a minimum it should be specified whether the six hours begins with the interference with a citizen's liberty or with the formal booking.<sup>54</sup>

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described as follows: "An admission is a statement pertinent to the issues and tending, in connection with other proof, to establish guilt; it is distinguishable from a confession in that a confession . . . is an acknowledgment of guilt in express terms, and a statement may be admissible as an admission even though not admissible as a confession." 10A P.L.E. *Criminal Law* § 291 (1970) (footnotes omitted). For cases making a similar distinction, see, e.g., *Commonwealth v. Oreszak*, 328 Pa. 65, 69-70, 195 A. 45, 48 (1937); *Commonwealth v. Elliott*, 292 Pa. 16, 20, 140 A. 537, 538-39 (1928); *Commonwealth v. Tenbroeck*, 265 Pa. 251, 254, 108 A. 635, 636 (1919); *Commonwealth v. Meehan*, 198 Pa. Super. Ct. 558, 565, 182 A.2d 212, 216 (1962), *rev'd on other grounds*, 409 Pa. 616, 187 A.2d 579 (1963).

50. For examples of oral statements made in various contexts and held admissible, see, e.g., *Commonwealth v. Lopinson*, 427 Pa. 284, 299, 234 A.2d 552, 561 (1967), *vacated on other grounds*, 392 U.S. 647 (1968) (statements made at scene of shooting held admissible); *Commonwealth v. Elliott*, 292 Pa. 16, 20-21, 140 A. 537, 538-39 (1928) (testimony about conversation between detective and accused held admissible).

51. See *Commonwealth v. Moon*, 389 Pa. 304, 309-10, 32 A.2d 224, 227, *petition for cert. dismissed*, 355 U.S. 908 (1957) (memorandum of gestures of defendant unable to speak due to self-inflicted wounds found admissible).

52. Under the *Futch* rule, exculpatory statements were excluded because they are not prejudicial. *Commonwealth v. Simmons*, 239 Pa. Super. Ct. 220, 225, 362 A.2d 402, 404-05 (1976). The *Davenport* rule, strictly applied, would enable the prosecution, theoretically at least, to seek suppression of exculpatory statements made during excessive prearrest periods. This result is so obviously inconsistent with the purposes of the rule in allowing the prosecution to benefit by excessive detentions, that courts should have no difficulty, it is submitted, in granting defendants' motions not to apply the six-hour rule to exculpatory statements.

53. The cases from *Futch* to *Davenport* do not define when arrest begins. For several definitions of an arrest, see *Commonwealth v. Richards*, 458 Pa. 455, 459, 327 A.2d 63, 65 (1974) ("arrest" is "any act that indicates an intention to take an individual into custody and that subjects him to the actual control and will of the person making the arrest"); *Commonwealth v. Dorsey*, 212 Pa. Super. Ct. 339, 343, 243 A.2d 176, 177 (1968) ("arrest" constitutes "apprehension or detention of the person of another in order that he may be forthcoming to answer for an alleged crime"). Professor Wayne LaFave defined arrest as a "distinct operational step in the criminal justice process, involving all police decisions to interfere with the freedom of a person who is suspected of criminal conduct to the extent of taking him to the police station for some purpose." LAFAVE, *ARREST: THE DECISION TO TAKE A SUSPECT INTO CUSTODY* 5 (1965). See also Note, *Philadelphia Police Practice and the Law of Arrest*, 100 U. Pa. L. Rev. 1182, 1185-88 (1952).

54. Failure to define an arrest may present police officers with insolvable problems. See note 53 *supra*. Is an arrest the interference with a citizen's liberty, such as detaining a material witness or is it simply the formal booking? If arrest is the former, then what if the material witness ultimately becomes the accused so that the total detention exceeds the six hours? If, on the other hand, arrest is the formal

There is a legitimate concern that the *Davenport* court's choice of a single enforcement mechanism<sup>55</sup> — inadmissibility of statements — may

booking or the point at which a citizen is identified as an accused, then presuming adherence to constitutional standards, statements made prior to booking would be outside the scope of the rule. For a discussion of several definitions of arrest, see note 53 *supra*.

55. In those states which do provide for prompt arraignment or arraignment within a set time period, the exclusion of evidence obtained is not the only enforcement mechanism utilized. For examples of judicially or legislatively imposed enforcement mechanisms to protect against prearrestment delay in other states, see *Gerlack v. Ferrari*, 184 Cal. App. 2d 702, 7 Cal. Rptr. 699 (1960) (where the arrest is lawful, violation of provision against unnecessary delay subjects the offending person to liability for false imprisonment); *Zdiarstek v. State*, 53 Wis. 2d 420, 192 N.W.2d 833 (1972) (due process requires exclusion of statements made during unreasonably long detention); UTAH CODE ANN. § 77-13-17 (Supp. 1977) (officer violating unnecessary delay standard shall be guilty of a misdemeanor). Statutes with fixed time periods that contain enforcement mechanisms include: ALASKA STAT. § 12.25.150(c) (1972) (violation of 24 hour rule punishable as misdemeanor by fine of no more than \$100 and/or 30 days); ARIZ. R. CRIM. P. 4.1(a) (if not brought before a magistrate within 24 hours, accused shall immediately be released); GA. CODE ANN. § 27-212 (1972) any person not arraigned within 48 hours shall be released); MO. ANN. STAT. § 544.170 (Vernon 1953) (unless charged "by the oath of some credible person within 20 hours," suspect shall be discharged).

The exclusionary rule, established in *Weeks v. United States*, 232 U.S. 383, 398 (1914) and extended to the states in *Mapp v. Ohio*, 367 U.S. 643, 656-57 (1961), requires that illegally obtained evidence not be admitted in court. In Pennsylvania the exclusionary rule has been codified in the Pennsylvania Rules of Criminal Procedure. PA. R. CRIM. P. 323. The purposes behind the rule are to preserve the "clean hands" of the court and to prevent police use of illegal tactics for obtaining evidence. 367 U.S. at 657, 659. See generally *Dellinger, Of Rights and Remedies: The Constitution as a Sword*, 85 HARV. L. REV. 1532, 1559-63 (1972); Kaplan, *The Limits of the Exclusionary Rule*, 26 STAN. L. REV. 1027 (1974); Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665 (1970).

The exclusionary dimension of the six-hour rule has apparently been effective in at least one urban Pennsylvania setting. Interview with Gilbert Branche, Field Support Units, Staff Services Bureau Inspector, Philadelphia Police Department (Sept. 26, 1977). Since the violating policeman is not directly punished and because a convicted criminal might be released due to insufficient evidence for a new trial, the exclusionary rule is not without its critics, one of the strongest being Chief Justice Burger. See *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 412-24 (1971) (Burger, C.J., dissenting). Recently, in *Brewer v. Williams*, 430 U.S. 387 (1977), Chief Justice Burger filed a strong dissent stating that the court had improperly failed to weigh the social costs of setting a convicted criminal free against the benefits of applying the exclusionary rule. *Id.* at 420-29 (Burger, C.J., dissenting). The rule before *Brewer* had undergone significant deterioration in its application. See *Stone v. Powell*, 428 U.S. 465, 489-95 (1976) (collateral relief by way of federal habeas corpus not available for claimed violation of exclusionary rule where claim already fully and fairly litigated in the state courts); *United States v. Janis*, 428 U.S. 433, 443-60 (1976) (*Mapp* rule held not to extend to federal civil proceedings to exclude evidence seized by a state criminal enforcement officer); *Brown v. Illinois*, 422 U.S. 590, 606, 608-09 (1975) (giving of *Miranda* warnings served to break causal connection between illegal arrest and giving of a statement) (Powell, J., concurring). For criticisms of the exclusionary rule and possible alternatives, see generally Burger, *Who Will Watch the Watchman?*, 14 AM. U.L. REV. 1, 10-23 (1964); Kaplan, *supra* at 1029-55; Oaks, *supra* at 672-757; Spiotta, *Search and Seizure: An Empirical Study of the Exclusionary Rule and Its Alternatives*, 2 J. LEGAL STUDIES 243, 268-78 (1973). Despite the criticism of the exclusionary rule, it is perhaps better than no restraint at all on the police. See *Terry v. Ohio*, 392 U.S. 1, 12 (1968); *Linkletter v. Walker*, 381 U.S. 618, 636 (1965); *Mapp v. Ohio*, 367 U.S. 643, 652, 656 (1961). See also Paulsen, *Safeguards in the Law of Search and Seizure*, 52 NW. U.L. REV. 1, 12 (1964); Paulsen, *The Exclusionary Rule and*

not, as the *Davenport* court expects, be wholly effective in achieving the goal of prompt arraignment.<sup>56</sup> Consider, for example, the many situations in which statements are superfluous to the prosecution. Nevertheless, it would seem indisputable that the rule, by specifically limiting interrogation, will result in fewer prearrest delays.<sup>57</sup>

Since the rule applies only to the exclusion of statements elicited during interrogation if the suspect is not arraigned within the six-hour period,<sup>58</sup> if a defendant elects to remain silent, the rule does not require that he be arraigned within six hours. In these situations, however, the "unnecessary delay" prohibition already incorporated into the Pennsylvania Rules of Criminal Procedure<sup>59</sup> would still seem applicable. Perhaps the greatest weakness of the *Davenport* rule may be exposed by a case in which strong, incriminating evidence from sources other than the accused has been uncovered prior to or soon after arrest,<sup>60</sup> so that the incentive to comply with the rule in order to preserve inculpatory statements may be totally lacking.<sup>61</sup>

Since the rule is only applicable to arrests occurring on and after May 16, 1977,<sup>62</sup> no cases have yet been found which applied the *Davenport* rule. Interviews with a judge, prosecutors and a police inspector, revealed several practical problems with respect to the rule. These difficulties accentuate the

*Misconduct by the Police*, 52 J. CRIM. L.C. & P.S. 255, 257 (1961). It is nevertheless questionable whether the exclusionary remedy is adequate or necessary with respect to statements elicited during an unnecessary delay since other states with rules similar to rules 122 and 130 of the Pennsylvania Rules of Criminal Procedure (see note 3 *supra*) either provide different enforcement mechanisms or none at all.

A corollary to the exclusionary rule is the "derivative doctrine," which requires that evidence derived from other illegally obtained evidence must be excluded. See *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920). For a discussion of this doctrine and its relationship to *McNabb-Mallory*, see generally Broeder, Wong Sun v. U.S., *A Study in Faith and Hope*, 42 NEB. L. REV. 483, 564-94 (1963); Comment, *Fruit of the Poisonous Tree — A Plea for Relevant Criteria*, 115 U. PA. L. REV. 1136 (1967). The court in *Davenport* did not address the effects of the derivative doctrine upon the six-hour per se rule, though, pursuant to the policy considerations behind the rule, the doctrine logically should be applicable here and the fruits of any statement elicited in violation of the rule should be inadmissible. For a discussion of the purposes behind speedy arraignment and the purposes of the six-hour rule, see notes 22-28 & 41-43 and accompanying text *supra*.

56. See 471 Pa. at 287, 370 A.2d at 306.

57. The *Davenport* rule does not, however, of its own force prevent all prearrest delay. For instance, the rule would not per se require the exclusion of identifications made at a lineup held during an extensive delay, although the *Futch* rule would seem to apply. See notes 13-15 and accompanying text *supra*. For cases dealing with the exclusion of an identification at a lineup conducted during prearrest detention, see, e.g., *Commonwealth v. Futch*, 447 Pa. 389, 290 A.2d 417 (1972); *Commonwealth v. Weaver*, 231 Pa. Super. Ct. 220, 331 A.2d 852 (1974); *Commonwealth v. Corbett*, 228 Pa. Super. Ct. 292, 323 A.2d 836 (1974).

58. 471 Pa. at 286, 370 A.2d at 306.

59. See PA. R. CRIM. P. 122, 130; note 3 *supra*.

60. Collecting such evidence from other sources cannot justify unnecessary delay. *Commonwealth v. Williams*, 255 Pa. 569, 573, 319 A.2d 419, 421 (1974).

61. Nevertheless, even when *Davenport* is not applicable, an "unnecessary delay" would presumably be violative of rules 122 and 130 of the Pennsylvania Rules of Criminal Procedure. See note 3 *supra*.

62. 471 Pa. at 288, 370 A.2d at 307.

tension between ensuring a defendant's constitutional rights and pursuing thorough police investigation of crime.<sup>63</sup>

According to the rule, if a suspect is not arraigned within six hours, any statements elicited during prearrestment interrogation will be excluded, even if the delay is not due to police action. Prearrestment delay caused by the defendant could redound to his benefit.<sup>64</sup> For instance, if an accused lied about his name or age, the resulting delay in arraignment would make any statements given during prearrestment inadmissible if the six hours were exceeded.<sup>65</sup>

Excessive delay may also be due to the unavailability of a judicial official. One Philadelphia Court of Common Pleas judge told of a call he had received from the police requesting a judge within seven minutes, which was not enough time to reach the police station.<sup>66</sup> The suspect was not arraigned until five minutes after the six-hour period.<sup>67</sup> The problem arose because the police had waited until the last minute to arraign and because another judge had left early.<sup>68</sup> The unavailability of a judicial officer for arraignment within six hours could be a common problem in rural areas even when police attempt to arraign promptly.<sup>69</sup>

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63. It is submitted that many of these problems are due to a lack of communication between the courts and the police. See generally LaFave & Remington, *Controlling the Police: The Judge's Role in Making and Reviewing Law Enforcement Decisions*, 63 MICH. L. REV. 987, 1003-08 (1965); Wasby, *The Communication of the Supreme Courts Criminal Procedure Decisions: A Preliminary Mapping*, 18 VILL. L. REV. 1086 (1973). As one author has stated: "The making of rules externally for police conduct suffers from two principal limitations. One is the absence of direct police involvement in the process." McGowan, *Rule-Making and the Police*, 70 MICH. L. REV. 659, 672 (1972). One commentator views the difficulties with controlling police behavior through court rulemaking to be inherent in the imposition of legislative functions on the judiciary. Speaking with respect to Supreme Court rulemaking, Professor Packer stated:

Nobody else is exerting control over the law enforcement process, so the justices think that they must. But they can do so, in state cases at any rate, only in the discharge of their duty to construe the Constitution in cases that come before them. And so, the rules of the criminal process, which ought to be the subject of flexible inquiry and adjustment by law-making bodies having the institutional capacity to deal with them, are evolved through a process that its warmest defenders recognize as to some extent awkward and inept: the rules become "constitutionalized."

Packer, *The Courts, the Police, and the Rest of Us*, 57 J. CRIM. L.C. & P.S. 238, 240 (1966). For a discussion of this tension between a defendant's rights and effective law enforcement, see generally Packer, *Two Models of the Criminal Process*, 113 U. PA. L. REV. 1 (1964).

64. Interview with Anita Cohen, Assistant District Attorney, Philadelphia (Sept. 24, 1977); Branche interview, *supra* note 55.

65. Cohen interview, *supra* note 64; Branche interview, *supra* note 55.

66. Interview with Judge Richard B. Klein, Philadelphia Court of Common Pleas (Sept. 24, 1977).

67. *Id.*

68. *Id.*

69. ALI has taken rural areas into account and provides an exception to the five hour total maximum of the prearrestment period. Section 130.5 of the ALI's MODEL CODE, *supra* note 12, reads as follows:

The regulations issued pursuant to Subsection 10.3(1) shall include provisions applicable to law enforcement agencies in counties [of a population yet to be

Furthermore, if a suspect is arrested in another state, extradited to Pennsylvania and arraigned after the six-hour limit, any statements made before arraignment would presumably have to be suppressed under a strict application of the rule.<sup>70</sup> Another problem could arise if a defendant committed a crime in Pennsylvania and was arrested and interrogated in another state. If he confessed during a detention exceeding six hours in a foreign state and was subsequently extradited to Pennsylvania, a narrow interpretation of the rule would presumably require that the defendant's confession be suppressed.<sup>71</sup>

Another practical problem arises for the police as a result of the on-the-scene calculations which a policeman must now make as to when he can properly interrogate an arrested suspect. For instance, if a suspect arrested at 10 a.m. suffers a heart attack at 3 p.m. and is therefore not arraigned until several days later, should any statement taken during prearraignment be admissible at the suspect's trial?<sup>72</sup> If so, should a statement taken between 10 a.m. and 3 p.m. be admissible and a statement given after 3 p.m. be excluded?<sup>73</sup> Such questions, it is suggested, highlight the need in emergency situations for an exception to the six-hour rule.<sup>74</sup>

Despite these potential problems with the rule, since the court in a subsequent order refers to the *Davenport* rule as a "new Rule of Criminal

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determined] setting forth different procedures or time periods for taking action from those specified in the preceding sections of Article 130, provided that such procedures shall meet applicable constitutional requirements, insure that an arrested person is brought before a judicial officer without unnecessary delay, and make provision for an adequate record for determination of compliance with the provisions of the Code. For purposes of determining whether statements are excludable pursuant to Subsections 150.2(3), (4) and (5), compliance with such regulations shall be deemed to be compliance with the applicable provisions of this Article 130.

MODEL CODE, *supra* note 12, at § 130.5.

70. The *Davenport* rule could conflict with § 110 of the Uniform Criminal Extradition Act which states in pertinent part:

No person arrested upon [a foreign jurisdiction's warrant] shall be delivered over to the agent whom the executive authority demanding him shall have appointed to receive him unless he shall first be taken forthwith before a judge of a court of record in this State who shall inform him of the demand made for his surrender and of the crime with which he is charged and that he has the right to demand and procure legal counsel. . . .

UNIFORM CRIMINAL EXTRADITION ACT § 110.

71. *Id.*

72. Branche interview, *supra* note 55.

73. For the basis of this possible exception, see note 44 and accompanying text *supra*. This question poses the difficulty of measuring the six hours when an emergency intervenes. Unless a police officer has the guidance of a strict definition of "emergency" and can easily pinpoint its beginning and end, it would be hard for him to determine when interrogation is proper during the delay. An exception to the rule for emergencies would be easier to apply 1) if the emergency rendered the rule inapplicable for the duration of the emergency or 2) if only those statements taken before the occurrence of the emergency were admissible. It is submitted that the first alternative would be the more reasonable and practical application of the six-hour rule.

74. See note 44 and the accompanying text *supra*.

Procedure,"<sup>75</sup> it is respectfully suggested that the *Davenport* rule be fully integrated into the Pennsylvania Rules of Criminal Procedure.<sup>76</sup> Regrettably, if the rule remains in its present form, the lack of standards and definitions for applying the rule will probably require the court to clarify it by judicial testing. It is submitted that this time-consuming process will undermine, at least initially, the goal of judicial economy.<sup>77</sup> The six-hour rule is nevertheless a clearer and more workable standard than the *Futch*

75. 471 Pa. at 288, 370 A.2d at 307. For an explanation of the rulemaking powers of the court, see note 35 *supra*. An example of the rulemaking of the Pennsylvania Supreme Court is found in *Commonwealth v. Hamilton*, 449 Pa. 297, 297 A.2d 127 (1972), in which the Court declared a limit on the period between filing of charges and trial. Although *Hamilton* did not set the 180 day standard, the court declared it "expedient to formulate a rule of criminal procedure fixing a maximum time limit in which individuals accused of crime shall be brought to trial." *Id.* at 308-09, 297 A.2d at 133. The formulation of the rule was eventually incorporated into the Pennsylvania Rules of Criminal Procedure. See PA. R. CRIM. P. 1100; Marshall & Reiter, *A Trial Court Working with Rule 1100* 23 VILL. L. REV. 284 (1978).

76. The following proposed rule of criminal procedure is submitted in the belief that it preserves the purpose of *Davenport* and helps to resolve some of the questions and problems examined in this note:

- a) Any person arrested must be arraigned within six (6) hours of arrest.
- b) If an arrested person is not arraigned within six hours of arrest, any statement obtained after arrest but before arraignment shall not be admissible at trial.
- c) If the accused is arraigned within six hours of arrest, prearrestment delay shall not be grounds for suppression of such statements except as the delay may be relevant to constitutional standards of admissibility.
- d) Any delay in the period between arrest and arraignment that, in the opinion of the court, is solely attributable to the intentional acts of the arrested person shall be excluded from the computation of the six-hour period.
- e) Any delay in the period between arrest and arraignment that, in the opinion of the court, is attributable to exigent circumstances shall be excluded from the computation of the six-hour period.
- f) Definitions. For the purposes of this rule, the following definitions shall apply:
  - 1) Arraignment. Arraignment refers to the preliminary arraignment procedures defined in rule 140 of the Pennsylvania Rules of Criminal Procedure.
  - 2) Arrest. Any police decision which results in the interference with the liberty of a person suspected of criminal conduct and which interference is for the purpose of initiating criminal proceedings against that person, shall constitute an arrest.
  - 3) Exigent Circumstances. Exigent circumstances can be established by proof that:
    - (A) a good faith effort to arraign promptly was made, and
    - (B) the delay was the result of unforeseeable circumstances, such as, for example, illness of the arrested person, preventing arraignment within six hours of arrest.
  - 4) Statement. A statement is:
    - (A) an oral or written assertion, or
    - (B) nonverbal conduct of a person, if it is intended by him as an assertion.

77. See note 41 and accompanying text *supra*.